SUPREME COURT, U. S.
AUG 15 1970

IN THE

Supreme Court of the United States

October Term, 1970

No. 546

WONG PAK YAN and WU CHUN HIN,

Petitioners,

against

DOMINICK RINALDI, as District Director for the Immigration and Naturalization Service of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DOMINICK RINALDI, as District Director for the Immigration and Naturalization Service of New Jersey,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgments of the United States District Court for the District of New Jersey.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1970. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Involved

Where the Attorney General is authorized to grant permanent residence (adjustment of status) to alien refugees from Communism who have been physically present

in the United States for two years 8 U. S. C. 1153 (a) (7), is he limited by the provisions of 8 U. S. C. 1255 and precluded from granting adjustment or permanent residence to alien crewmen?

Statutes Involved

Immigration & Nationality Act of 1952, as amended:

Section 203 (a)(7), 8 U. S. C. [1964 ed., Supp. 1] §1153(a):

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 percentum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they had fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion or political opinion, and (iii) are not nationals of the countries or areas in which their application for condition entry is made or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3)

Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference of nonpreference visas authorized to be issued under section 203(a) within the class to which the alien is chargeable, for the fiscal year then current . . . .

Regulations Involved

Title 8, Code of Federal Regulations 245.1(d) provides in part:

> "(d) Immediate relatives under Section 201(b) and preference aliens under Section 203(a)(1) through 203(a)(7).
>
> ". . . An alien who claims preference status under the proviso to Section 203(a)(7) of the Act is not eligible for the benefits of Section 245 of the Act as provided in §245.4 unless the District Director has approved the alien's Application for Classification as a Refugee under the proviso to Section 203(a)(7), Immigration and Nationality Act."

Title 8, Code of Federal Regulations 245.4 provides:

> "§245.4 Adjustment of status under the proviso to Section 203(a)(7) of the Act.
>
> "The provisions of Section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to Section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to Section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to Section 203(a)(7) of the Act shall execute, and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the District Director; no appeal shall lie from his determination." (31 F. R. 536, January 15, 1966.)

Statement

Petitioner Wong Pak Yan, a native of China, entered the United States as a crewman on November 13, 1966. Petitioner Wu Chun Hin, a native of China, entered the United States as a crewman on April 20, 1964. Both petitioners had deportation hearings and were ordered deported to Hong Kong. When the petitioners received notices to surrender for deportation, they submitted applications to the respondent requesting that they be classified as refugees and that their status be adjusted to that of permanent residents of the United States, pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, 8 U. S. C. 1153 (a)(7). With these applications the aliens also submitted applications for stays of deportation, pending the determination of their applications for the adjustments of their status. Their applications for stays were denied by the District Director, upon the grounds that relief was only available under 8 U. S. C. 1255, Section 245, Immigration and Nationality Act, and that such relief was unavailable to alien crewman.

Faced with this decision, the petitioners commenced actions in the United States District Court alleging that they were entitled to apply for the adjustment of their status pursuant to Section 203(a)(7) of the Immigration and Nationality Act, and that the regulations No. 8 C. F. R. 245.1 D and 245.4 which make them ineligible for such relief was illegal and void. The District Court on August 1, 1969, granted summary judgment, and dismissed the complaints, finding the government's actions proper.

An appeal was filed in the United States Court of Appeals, Third Circuit, from this determination. On June 25, 1970, the Court of Appeals affirmed the decision of the District Court.

Reasons for Granting the Writ

For the first time in the history of our immigrations laws, a permanent refugee provision was placed in the statute. The instant litigation, affecting a potential 10,200 refugees annually [8 U. S. C. 1153(a)(7)], seeks an interpretation of this provision in the statute.

Our quota limitations spell out 8 categories of preferences for aliens [8 U. S. C. 1153(a)(7)]. Each of the first 6 preferences are available to aliens within and outside the United States. The statute reserves the seventh preference, 203(a)(7), for refugees who have fled Communism, persecution, or catastrophic national calamities. It further provides the grant of permanent residency to refugee aliens "who have been in the United States for a period of at least two years prior to application for adjustment of status." The Court below sustained a regulation which precludes alien crewmen from such benefits. The Immigration Service requires that such adjustment applications be filed under 8 U. S. C. 1255, which denies adjustment to alien crewmen 8 C. F. R. 245.4.

The statute itself, Section 203(a)(7), does not specifically refer to adjustment of status pursuant to Section 245. It is a requirement that has been read into the law by the Immigration Service, and one that prohibits many refugees from applying for relief under a statute whose purpose was to liberalize the immigration laws.

The petitioners appear to satisfy the first part of Section 203(a)(7), in that, because of persecution they fled from a Communist or Communist-dominated country and are unwilling to return to such country. Nowhere in Section 203(a)(7) is the manner of entry of the alien considered. In fact, it is quite logical to assume that a person who is a refugee entered this country illegally, such as,

without being inspected by an immigrant inspector. If the Government's position is correct, aliens who come to the United States without being inspected, would also be precluded from adjusting their status pursuant to this section, the reason being, that an alien who entered the United States without inspection is not eligible to adjust his status pursuant to Section 245.

The Court below sought support in the legislative history of the 1965 Act. *Senate Report* 748, p. 22, observes that "It is contemplated that such adjustments will be made under Section 245." This was at a time when the legislative proposal was to grant such relief to alien crewmen. (*Senate Report 748, supra*, p. 20.) There was no concurrence upon this contemplated procedure or upon the proposal to grant Section 245 benefits to crewmen by the House of Representatives. On the contrary, the section by section analysis by the House of Representatives Committee contains identical language as the Senate Report but it specifically omits the statement that adjustment will be made under Section 245 (*House Report* 745, *supra*, p. 22). This omission points to a conflict in interpretation by coordinate branches of Congress.* Upon this ambiguous history, the Court below resolved remedial statutory language strictly rather than liberally, contrary to *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1938), *Do v. Esperdy*, 309 F. 2d 467 (2d Cir. 1962).

It is interesting to note that Section 203 has many subdivisions. The first eight of these subdivisions deal solely with the availability of visas. Sections 1, 2, 3, 4, 5, 6 and 8 mention only the preference in which visas shall be made available to intending immigrants. Nowhere in

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* The presence of the statement in the Senate Report and not in the House Report is an argument against reading it as implied by the House Committee. See *United States v. Atchison T. & S. F. R. Co.*, 220 U. S. 37 (1910).

these subdivisions is the method of obtaining the visa mentioned, except that Section 203(a)(7) specifies the manner in which a refugee can obtain condition entry into the United States and the way a refugee may adjust his status in the United States. Thus we can see that subdivision "7", the one in issue at the bar, is inherently different from the other seven subdivisions of Section 203 because it provides the method for obtaining entry into the United States in addition to providing the availability of a quota number. An alien for whom a quota number would be available under any of the other seven subdivisions of Section 203(a) would, of course, be eligible to adjust his status pursuant to Section 245 of the Immigration Law and be bound by the requirements of Section 245. If subdivision "7" was to have been governed by Section 245, the words, "adjustment of status" would not have had to be included in the section.

It is also interesting to note that a conditional entrant (a person who enters the United States as a refugee) pursuant to Section 203(a)(7) is permitted to adjust his status in the United States after a two year residency in the United States (See 203(g)(h)). This procedure is outside of the procedure of Section 245 of the Immigration and Nationality Act. Congress surely did not provide in the same Section, 8 U. S. C. 1153(a)(7) for two types of adjustment: one outside Section 245 for refugees classified as conditional entrants and, one within Section 245 for other refugees.

The basic rule of law is that enabling legislation in immigration should be construed liberally; while deportation statutes should be construed strictly. The Government's position is that the remedial statute, Section 203(a)(7) should be construed strictly. This is an error. The interpretation should be a liberal one and an aid to refugee aliens in the United States. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1938); *Do* v. *Esperdy*, 309 F. 2d 467 (2d(Cir. 1962); *Sun* v. *Barber*, 144 F. Supp. 850 (N. D. Calif. 1956).

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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LEBENKOFF & COVEN,
Of Counsel.

APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18,281

WONG PAK YAN,

Appellant,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey,
(D. C. Civil Action No. 229-69)

No. 18,282

WU CHUN HIN,

Appellant,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey,
(D. C. Civil Action No. 402-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: MARIS, FREEDMAN and SEITZ, *Circuit Judges.*

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed August 1, 1969, be, and the same are hereby affirmed, with costs taxed in favor of appellee.

ATTEST:

THOMAS F. QUINN,

APPENDIX B

Opinion of the Court

(Filed June 25, 1970)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18281

WONG PAK YAN,

Appellant,

v.

DOMINICK RINALDI, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE OF NEW JERSEY

No. 18282

WU CHUN HIN,

Appellant,

v.

DOMINICK RINALDI, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE OF NEW JERSEY

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 7, 1970

Before MARIS, FREEDMAN and SEITZ, *Circuit Judges.*

Appendix B

By MARIS, *Circuit Judge*.

The plaintiffs are aliens who claim to be refugees from the Communist controlled Peoples Republic of China. They entered the United States as crewmen in 1966 and 1964, respectively. Having overstayed the period of 29 days during which they were lawfully entitled to remain in this country, they were subsequently called upon to surrender for deportation and were ordered deported to Hong Kong. Prior to the entry of the deportation orders they applied for reclassification as refugees and for admission for permanent residence under the proviso to section 203(a)(7) of the Immigration and Nationality Act, as amended. They also asked for stays of their deportation pending action on these applications. The applications were refused by the defendant on the ground that by the express provisions of section 245.4 of the Immigration Regulations, such reclassification was governed by Section 245 of the Act, which specifically excludes alien crewmen from reclassification. The plaintiffs thereupon filed complaints in the District Court for the District of New Jersey seeking judgments declaring that the plaintiffs were entitled to apply for adjustment of their immigration status pursuant to section 203(a)(7) and were statutorily entitled to such relief and further declaring that the regulations which in effect deny them such relief are illegal and void. The complaints also asked that the defendant be restrained from deporting them pendente lite.

Section 203(a)(7) of the Immigration and Nationality Act as amended by the Act of October 3, 1965; Pub. L. 89-236, §3, 79 Stat. 913, provides as follows:

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and

Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-Dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status." 8 U.S.C.A. § 1153(a)(7).

Section 235.9 of the Immigration Regulations, prescribed by the Commissioner of Immigration and Naturalization under the Act, 8 CFR § 235.9, provides that the countries in which applications for conditional entry under section 203(a)(7) may be made to officers of the Service are Austria, Belgium, France, Germany, Greece, Italy and Lebanon.

Subsection (a) of section 245 of the Immigration and Nationality Act of 1952 as amended by the Act of July 14, 1960, Pub. L. 86-648, § 10, 74 Stat. 505, provides:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved." 8 U.S.C.A. § 1255.

Section 245.4 of the Immigration Regulations, 8 CFR § 245.4, provides in its first sentence:

"The provisions of Section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act."

The plaintiffs contend that section 203(a)(7) of the Act itself provides for the readjustment of the status of all refugees and that, therefore, section 245.4 of the Regulations which purports to narrow the scope of section 203(a)(7) to aliens coming within the limitations of section 245 of the Act, that is, to those only who are not crewmen and who have previously been inspected and admitted or paroled into the United States, is invalid.

We do not agree. As we said in Cheng Ho Mui v. Rinaldi, 1969, 408 F.2d 28, 30, "Section 203(a)(7) does not create any new procedure for the adjustment of status; it simply provides a means of entering the United States." We are in accord with the Court of Appeals for the Ninth Circuit which stated in Wing Wa Lee v. Immigration and Naturalization Service, 1967, 375 F.2d 723, 724: "It is clear that in section 203(a)(7) Congress was providing for the immigration of refugees and not defining any new method of adjustment of status. There is no language in

section 203(a)(7) which authorizes the Attorney General to adjust any alien's status. Adjustment provisions must be found somewhere other than section 203(a)(7)."

We think it is apparent from the language of section 203(a)(7) that its purposes are solely two—(1) to make conditional entries available to refugees who apply for them in certain foreign countries, and (2) to authorize the issuance of immigration visas "in lieu of conditional entries of a like number" to refugees who have previously been admitted to the United States on conditional entries, who have been continuously present here for two years and whose status has been adjusted to that of an alien lawfully admitted for permanent residence. We must look elsewhere for the statutory authority to make such an adjustment of a refugee's status as will entitle him to an immigration visa under the proviso to section 203(a)(7) in lieu of his conditional entry. This authority is provided by section 245 of the Act. While there are other statutory provisions dealing with status adjustment they are clearly not applicable here and need not be considered.

Section 245.4 of the Immigration Regulations merely makes the interacting relationship of sections 203(a)(7) and 245 clear. In so doing, it carries out the intent of Congress in enacting the proviso to section 203(a)(7) by the Act of October 3, 1965. This intent is expressed in the report of the Senate Committee of the Judiciary upon the bill, H.R. 2580, which became the Act of 1965, in which report it is stated with respect to the adjustment of status referred to in the proviso that "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." S. Rept. 748, 89th Cong., 1st Sess., 1965 U.S. Code, Congressional and Administrative News, p. 3341.

Since the plaintiffs, as alien crewman, could not bring themselves within the purview of section 245 of the Act their applications were properly denied by the defendant.

The district court, therefore, did not err in dismissing their complaints.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

No. 428

In the Supreme Court of the United States

OCTOBER TERM, 1975

WONG PAK YAN AND WU CHUNG HIN, PETITIONERS

v.

DOMINICK RINALDI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 546

WONG PAK YAN AND WU CHUN HIN, PETITIONERS

v.

DOMINICK RINALDI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are natives and citizens of China who entered the United States on November 13, 1966 and April 20, 1964, respectively, as crewmen on shore leave for a period not to exceed 29 days or until their ship departed, whichever was shorter. They jumped ship. Upon their discovery deportation proceedings were commenced and deportation orders to Hong Kong were entered based on their unauthorized overstay. The district director refused to stay deportation while petitioners attempted to obtain adjustment of status

to permanent residence as refugees under Section 203 (a)(7) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1153(a)(3).[1] He reasoned that Section 245[2] of the Act, as amended—the only pro-

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[1] Section 203(a)(7) provides in pertinent part:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201 (a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; * * * *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

[2] Section 245(a) provides:

> The status of an alien, *other than an alien crewman*, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved. [emphasis added]

vision for adjustment under which they could conceivably apply, see *Wing Wa Lee* v. *Immigration and Naturalization Service*, 375 F.2d 723, 724-725 (C.A. 9), certiorari denied, 389 U.S. 856—expressly excluded alien crewmen from its benefits. The district court and the court of appeals agreed with this administrative finding (Pet. App. B).

The sole question presented is the validity of this ruling as to statutory construction. Both the Second and Ninth Circuit have previously resolved this issue adversely to petitioners. This Court has declined further review. *Wing Wa Lee* v. *Immigration and Naturalization Service*, 375 F.2d 723, 724-725 (C.A. 9), certiorari denied, 389 U.S. 856; *Tai Mui* v. *Esperdy*, 371 F.2d 772, 778-780 (C.A. 2), certiorari denied, 386 U.S. 1017; see also, *Cheng Ho Mui* v. *Rinaldi*, 408 F.2d 28, 30-31 (C.A. 3), certiorari denied, 395 U.S. 963. The government extensively developed the legislative history of the provisions involved and the issue on the merits in its Memorandum in Opposition in *Tai Mui* (Nos. 1037, 1038 and 1090, O. T. 1966, pp. 3-9). Petitioners' counsel in this case, who also represented the aliens in *Tai Mui*, has shown nothing new in legislative history or subsequent judicial decisions that suggests any basis for review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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